Supreme Court, U.S.
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91-1116

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH HICKS,
Petitioner,

vs.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Civil Rights Act of 1991, in particular Section 101 of the Act, applies retroactively to cases pending in court on the date of its enactment so that judgment must be entered in favor of plaintiff Hicks in this case?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Petition for Certiorari	7
Conclusion	10
Appendix	
A. Order of the United States Court of Appeals for the Eighth Circuit (October 9, 1991)	A-1
B. Order of the United States Court of Appeals for the Eighth Circuit (December 23, 1991)	A-3

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexandre v. AMP, Inc., 57 FEP Cases 768 (W.D. Pa., Dec. 5, 1991) 8

Barr v. Matteo, 355 U.S. 171 (1957) 9

Bowman v. Loperena, 311 U.S. 262 (1940) 6

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 9

Brown Group, Inc. v. Hicks, 111 S. Ct. 1299 (1991) 3

Bureau of Economic Analysis v. Long, 454 U.S. 934 (1981) 9

Clarke v. United States, 898 F.2d 162 (D.C. Cir. 1990) 6

Hansel v. Public Service Company of Colorado, 1991 U.S. Dist. Lexis 17904 (D. Colo., Dec. 11, 1991) 8

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990) 3,4

James v. American International Recovery, Inc., C.A. No. 1:89-CV-321-RHH (N.D. Ga., Dec. 3, 1991) 8

King v. Shelby Medical Center, C.A. No. 91-AR-2258-S (N.D. Ala., Dec. 18, 1991) 8

LaCour v. Harris County, 57 FEP Cases 622 (S.D. Tex., Dec. 6, 1991) 8

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Massey v. United States, 291 U.S. 608 (1934) 6

Mojica v. Gannett Co., 57 FEP Cases 537 (N.D. Ill., Nov. 27, 1991) 8

Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989) 3,4

Sioux Tribe v. United States, 329 U.S. 684 (1946) 9

Stender v. Lucky Stores, C.A. No. C-88-1467 (N.D. Calif., Dec. 19, 1991) 8

Taggart v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990) 3

Van Meter v. Barr, 57 FEP Cases 769 (D.D.C., Dec. 18, 1991) 8

Statutes:

42 U.S.C. § 1981 ..... *passim*

Civil Rights Act of 1991 ..... *passim*

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OPINIONS BELOW

The Order of the Eighth Circuit Court of Appeals dated October 9, 1991 which reversed the judgment of the district court in favor of plaintiff Hicks and remanded the case to the district court with directions to dismiss his complaint with prejudice is reported at 946 F.2d 1344 (8th Cir. 1991) and is printed in the Appendix. The Order of the Eighth Circuit Court of Appeals dated December 23, 1991 which denied plaintiff Hick's motion to vacate the Court's Order dated October 9, 1991 is not reported and is printed in the Appendix.

JURISDICTIONAL STATEMENT

The Order of the Eighth Circuit Court of Appeals reversing the judgment of the district court in favor of plaintiff Hicks and remanding the case to the district court with directions to dismiss his complaint with prejudice was entered on October 9, 1991.

The Order of the Eighth Circuit Court of Appeals denying plaintiff Hick's motion to vacate the Court's Order dated October 9, 1991 was entered on December 23, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 101(2)(b) of the Civil Rights Act of 1991 amends 42 U.S.C. § 1981 to include the following language:

> For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

The history of this case, though complex, can be briefly summarized. In 1982, plaintiff Kenneth Hicks, petitioner herein, was terminated from his job by defendant Brown Group, respondent herein. After he was fired, plaintiff Hicks brought suit under 42 U.S.C. § 1981 alleging that his termination was due in relevant part to his race. In 1988, a jury agreed with him, though it declined to award him any actual damages. Instead, it awarded him $10,000 in punitive damages on the ground that Brown Group's discrimination was willful. The district court modified the actual damages to $1.00, left the award of punitive damages undisturbed, and entered judgment in favor of plaintiff Hicks.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed. *See Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990). It ruled, among other things, that claims of racially motivated discharge from employment were still actionable under Section 1981 even after this Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989). In *Patterson*, this Court narrowly construed the scope of Section 1981. In particular, this Court said that the right to "make and enforce contracts" covers only "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 2374. According to the Court, Ms. Patterson's claim of on-the-job racial harassment involved "[n]either a refusal to make a contract with her or the impairment of her ability to enforce her established contract rights. Rather, the conduct which [she] labels as actionable racial harassment is postformation conduct by the employer relating to the terms and conditions of continuing employment . . . This type of conduct . . . is not actionable under § 1981." *Id.* Because Brown Group believed that discriminatory discharge, like racial harassment, was postformation conduct not covered by Section 1981, it sought review of the panel's decision by this Court.

In the meantime, a different panel of the Eighth Circuit Court of Appeals criticized the result in the *Hicks* case. *See Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990). The Eighth Circuit granted rehearing en banc in the *Taggart* case to reexamine the impact of *Patterson* on claims of discriminatory discharge brought under Section 1981. 934 F.2d 1414. This Court responded to this development by vacating the judgment in *Hicks* and remanding the case to the Court of Appeals for further consideration in light of its en banc opinion to be filed in *Taggart*. *See Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

The Eighth Circuit, sitting en banc, handed down its opinion in *Taggart* on June 6, 1991. The Court ruled that under *Patterson*

discriminatory discharge claims are not actionable under Section 1981. 935 F.2d 947, 948 (8th Cir. 1991). As a result, the panel of the Court of Appeals that originally heard the *Hicks* case issued an Order on October 9, 1991 reversing the judgment in favor of plaintiff Hicks and remanding the case to the district court with directions to dismiss his complaint with prejudice.

On or about October 22, 1991 plaintiff Hicks filed a timely motion to stay the mandate pending application to the U.S. Supreme Court for a writ of certiorari. By order dated October 31, 1991, the Court of Appeals granted the motion. It ordered that the mandate in the case be stayed to and including December 30, 1991.

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991. Section 101 of the Act overturns the *Patterson* decision and expressly provides that claims of racially motivated discharge from employment are actionable under Section 1981:

> **SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.**
>
> Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended— . . .
>
> (2) by adding at the end the following new subsections:
>
> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

(emphasis added). In plaintiff Hicks' view, the text, structure and purpose of the Civil Rights Act of 1991 manifest a clear legislative intent in favor of retroactive application of its provi-

sions to cases pending in court on the date of its enactment. Accordingly, he filed a motion to vacate the Order of the Court of Appeals dated October 9, 1991 which dismissed his claim under Section 1981. In support of his motion, he filed a detailed memorandum of law setting forth his arguments in favor of retroactive application of the Civil Rights Act to the case at bar. Additionally, he filed a motion to extend the stay of mandate pending final resolution of his motion to vacate. These motions were filed with the Court of Appeals on December 3, 1991. Defendant Brown Group responded to them on or about December 11, 1991. Among other things, Brown Group filed a detailed memorandum of law setting forth its arguments against retroactive application of the Civil Rights Act to the case at bar.

On December 23, 1991, the Eighth Circuit Court of Appeals issued an Order denying plaintiff Hicks' motions. The Court reasoned as follows:

> In his motion to vacate this Court's judgment of October 9, 1991, Hicks argues that this provision of the Act [Section 101] should apply retroactively to his action against Brown Group, Inc. In view of the Supreme Court's previous remand of this matter we believe this question requires the consideration of the court en banc with the subsequent opportunity for Supreme Court review.
>
> Hicks has failed, however, to file a timely petition for rehearing with suggestion for rehearing en banc. Because of this failure, the time period during which he may petition the Supreme Court for a writ of certiorari to review this court's judgment will expire on January 7, 1991. *See* Sup. Ct. R. 13.1; 13.4. The delay which en banc consideration of this matter would entail therefore would foreclose Hicks' access to further review by the Supreme Court.
>
> Under these circumstances, we believe the question of the retrospective effect of the Civil Rights Act of 1991 on this

> case should be presented to the Supreme Court in a petition for writ of certiorari. Accordingly, Appellee Hicks' motions are hereby denied.

See Appendix B. The Court of Appeals was correct in noting that plaintiff Hicks did not file a timely petition for rehearing with suggestion for rehearing en banc in this case. It is important to point out, however, that it was impossible for plaintiff Hicks to file such a petition in this case; the time for doing so expired on October 23, 1991. *See* F.R.A.P. 35 and 40. At that time, the Civil Rights Act of 1991 was not law. In fact, nobody knew at that time whether it would ever become law. Accordingly, plaintiff Hicks was in no position to file a timely petition for rehearing with suggestion for rehearing en banc in this case based on the passage of the Civil Rights Act of 1991. As it turned out, the Act did not become law until November 21, 1991. Plaintiff Hicks responded to this legislative development by promptly filing a motion to vacate the Court of Appeals' Order dated October 9, 1991 which dismissed his Section 1981 claim. This motion to vacate was the legal equivalent of a petition for rehearing. *Clarke v. United States*, 898 F.2d 162, 164 (D.C. Cir. 1990). Technically, however, it was not timely. As a result, its filing did not toll the time for filing a petition for certiorari with this Court. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). The clock continued to run and the Court of Appeals concluded that the delay involved in giving *en banc* consideration to plaintiff Hicks' retroactivity argument would foreclose his access to further review by this Court. Accordingly, it ruled that the retroactivity issue should be presented to this Court in a petition for a writ of certiorari. *Cf. Massey v. United States*, 291 U.S. 608 (1934).

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Many of the cases coming to the U.S. Supreme Court on certiorari involve the interpretation and enforcement of laws of Congress. In some, the intrinsic importance of the statutory issue is the major basis for securing review by this Court. In others, there is a conflict of decisions among the lower federal courts concerning the meaning of the statute. Both factors combine in this case to warrant review by this Court.

The Civil Rights Act of 1991 is a landmark statute. It restores and strengthens the federal civil rights laws banning discrimination in employment. The statute is complex and covers a wide variety of topics. The novel question squarely presented in this case — whether the statute applies retroactively to cases pending in court on the date of its enactment — is one of exceptional national importance. Federal trial judges around the country have an immediate need to know whether the statute applies to civil rights cases currently pending in their courts. Certainly this is true of the many cases brought under Section 1981. But it is also true of the many cases brought under other federal antidiscrimination statutes. For example, Section 102 of the Act expressly provides, for the first time, for jury trials and compensatory and punitive damages in cases brought under Title VII of the Civil Rights Act of 1964. There are several thousand Title VII cases pending in the federal courts. Does Section 102 of the Act apply to these cases? Nobody knows for sure. Yet it is important that federal trial judges have a clear answer to this kind of question. It is vitally important that they get the answer right. If they get it wrong, they will have to retry thousands of cases. This would entail an enormous waste of time and resources for litigants and courts alike. The disturbing prospect of a massive number of retrials in cases brought under the civil rights laws calls for the immediate exercise of this Court's power of supervision over the federal judiciary to clarify the meaning and application of the Civil Rights Act of 1991.

The retroactivity issue is not only novel and important but it is also difficult and troublesome. The basic problem stems from the fact that Congress did not explicitly state, in so many words, whether it wanted the Civil Rights Act of 1991 to apply retroactively or prospectively. As a result, the federal district courts are sharply divided over the issue. At least four courts have ruled that the Civil Rights Act of 1991 is retroactive. *See Stender v. Lucky Stores*, C.A. No. C-88-1467 (N.D. Calif., Dec. 19, 1991); *King v. Shelby Medical Center*, C.A. No. 91-AR-2258-S (N.D. Ala., Dec. 18, 1991); *Mojica v. Gannett Co.*, 57 FEP Cases 537 (N.D. Ill., Nov. 27, 1991); *LaCour v. Harris County*, 57 FEP Cases 622 (S.D. Tex., Dec. 6, 1991). At least four other courts have ruled that the Civil Rights Act of 1991 is prospective. *See Van Meter v. Barr*, 57 FEP Cases 769 (D.D.C., Dec. 18, 1991); *Hansel v. Public Service Company of Colorado*, 1991 U.S. Dist. Lexis 17904 (D. Colo., Dec. 11, 1991); *James v. American International Recovery, Inc.*, C.A. No. 1:89-CV-321-RHH (N.D. Ga., Dec. 3, 1991); *Alexandre v. AMP, Inc.*, 57 FEP Cases 768 (W.D. Pa., Dec. 5, 1991). This conflict among the courts surfaced rapidly even before the ink on the Act was dry. As Judge Gesell has remarked, the law is in a "state of total confusion." *Van Meter, supra.* The passage of time will not cure the problem; it will only exacerbate it. There will be widespread litigation, with conflicting results, until the matter is finally settled by this Court. Under these circumstances, this Court cannot afford to postpone consideration of the issue. An early and definitive ruling is needed to dispel the fog of confusion which currently hangs over the federal court system and which threatens to disrupt the orderly and efficient administration of justice in it. *See Laing v. United States*, 423 U.S. 161, 167 (1976).

It is important to note, however, that this Court should grant the petition for certiorari even if it concludes, for whatever reason, that it will not decide the issue of the retroactivity of the Civil Rights Act of 1991 in this case. At a minimum, it should

grant the petition, vacate the judgment of the Eighth Circuit Court of Appeals, and remand the case to that Court with directions to pass upon plaintiff Hicks' argument that the Act applies retroactively to this case. This argument was presented to the Court of Appeals but was not ruled upon by the Court of Appeals. Elementary considerations of fairness and justice dictate that plaintiff Hicks have his day in court on the retroactivity issue. Surely *some* court should address and resolve the merits of his argument that the Civil Rights Act of 1991 applies retroactively to this case. This Court has the authority, in the exercise of its discretion, to order the Court of Appeals to pass upon this argument, even if the argument was not presented to the Court of Appeals in a timely fashion. *Barr v. Matteo*, 355 U.S. 171, 173 (1957). In fact, this Court has routinely remanded cases to the Courts of Appeal for reconsideration in light of intervening legislative developments. *See, e.g., Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981); *Sioux Tribe v. United States*, 329 U.S. 684, 685 (1946). Accordingly, in the event this Court declines to address and resolve the merits of plaintiff Hicks' retroactivity argument it should order the Court of Appeals to address and resolve the merits of that argument.[1]

---

[1] Without question, the case at bar is still "pending" for purposes of applying new legislation to it inasmuch as the appellate process has not yet been fully exhausted. *See Bradley v. Richmond School Board*, 416 U.S. 696, 711 n.14 (1974).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

Nos. 85-2769/2817

Kenneth G. Hicks,
Appellee/cross-appellant,

v.

Brown Group, Inc., d/b/a Brown Shoe Company, Inc.,
Appellant/cross-appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

[PUBLISHED]

Filed: October 9, 1991

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

ORDER

On March 18, 1991, the United States Supreme Court vacated the judgment of this court in the present case and remanded the case to this court for further consideration in light of this court's en banc opinion to be filed in *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir.) (*Taggart*), *reh'g en banc granted*, 934 F.2d 1414 (1990). *Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

On June 6, 1991, this court filed its en banc opinion in *Taggart* holding that, after the Supreme Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), discriminatory discharge claims are not actionable under 42 U.S.C. § 1981. 935 F.2d 947, 948 (8th Cir. 1991). The mandate in *Taggart* was issued in August 1991.

Pursuant to the directions of the Supreme Court, we have reconsidered our opinion in light of this court's en banc opinion in *Taggart*. Accordingly, we now reverse the judgment of the district court and remand the case to the district court with directions to dismiss the complaint with prejudice.

A true copy.

Attest:

/s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

Nos. 88-2769/2817

Kenneth G. Hicks,
Appellee/Cross-Appellant,

v.

Brown Group, Inc., d/b/a Brown Shoe Company, Inc.,
Appellant/Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Filed: December 23, 1991

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

ORDER

Before the court are motions of appellee Kenneth G. Hicks to vacate this court's judgment of October 9, 1991, and to extend the stay of mandate entered on October 31, 1991, and effective through December 30, 1991. For the reasons discussed below, we deny both motions.

In October 1988, the district court entered judgment for Hicks following a jury trial in Hicks' action under 42 U.S.C. § 1981 alleging racially discriminatory termination of employment. On April 16, 1990, this panel affirmed the judgment of the district court. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990). On March 18, 1991, the Supreme Court vacated the panel's opinion and remanded the case for further consideration in light of this court's then-pending en banc decision in *Taggart v. Jefferson County Child Support Enforcement Unit. Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

On June 6, 1991, this court ruled in *Taggart* that the Supreme Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), precluded discriminatory discharge claims under 42 U.S.C. § 1981. *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947, 948 (8th Cir. 1991) (en banc). Accordingly, on October 9, 1991, this panel issued an order reversing the district court in *Hicks* and remanding the case with instructions to dismiss Hicks' complaint with prejudice. Hicks sought a stay of the mandate, which was granted until December 30, 1991.

On November 21, 1991, President Bush signed the Civil Rights Act of 1991 into law. Section 101(2)(b) of the Act amends 42 U.S.C. § 1981 to include the following language:

> For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Civil Rights Act of 1991, § 101(2)(b) (text of S. 1745 as approved by House and Senate Nov. 7, 1991).

In his motion to vacate this court's judgment of October 9, 1991, Hicks argues that this provision of the Act should apply retrospectively to his action against Brown Group, Inc. In view of the Supreme Court's previous remand of this matter, we believe this question requires the consideration of the court en banc with the subsequent opportunity for Supreme Court review.

Hicks has failed, however, to file a timely petition for rehearing with suggestion for rehearing en banc. Because of this failure, the time period during which he may petition the Supreme Court for a writ of certiorari to review this court's judgment will expire on January 7, 1991. *See* Sup. Ct. R. 13.1; 13.4. The delay which en banc consideration of this matter

would entail therefore would foreclose Hicks' access to further review by the Supreme Court.

Under these circumstances, we believe the question of the retrospective effect of the Civil Rights Act of 1991 on this case should be presented to the Supreme Court in a petition for writ of certiorari. Accordingly, appellee Hicks' motions are hereby denied.

A true copy.

Attest:

/s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.